No. 14957

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EVERT L. HAGAN, Administrator of the Estate of J. A. Hagan, Deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

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BRIEF FOR THE APPELLEE.

Opinion Below.

The District Court did not render an opinion in granting the motion to dismiss first amended complaint.

Jurisdiction.

This appeal involves federal income taxes for the years 1945 and 1946. Jurisdiction of the District Court was claimed by the administrator to be conferred by 28 U. S. C., Section 1346 [R. 19]. After motion of the United States to dismiss the administrator's first amended complaint for want of jurisdiction over the subject matter and for failing to state a claim upon which relief could be granted [R. 47], judgment was entered on October 12,

1955 [R. 58] dismissing the first amended complaint [R. 19-45]. On January 9, 1956, and within the time allowed the administrator by the District Court's order extending time in which to file notice of appeal [R. 60], notice of appeal was filed [R. 61]. Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

Question Presented.

Whether the District Court erred in dismissing the first amended complaint where the complaint did not show that claims for refund were filed within the time limitations provided by Section 322 or Section 3801 of the Internal Revenue Code of 1939, and where the complaint showed that there had not been a determination that resulted in a "Circumstance of Adjustment" under Section 3801 of the Code.

Statutes and Regulations Involved.

The pertinent statutes and Regulations will be found in the Appendix, *infra.*

Statement.

The District Court granted the motion of the United States to dismiss the first amended complaint [R. 57-58]. From this judgment the taxpayer now appeals [R. 61].

The first amended complaint alleged in substance as follows:

This action is one to recover income taxes erroneously and illegally assessed and collected [R. 19-20].

Evert L. Hagan, a citizen of the United States, is the duly qualified and acting administrator of the estate of J. A. Hagan [R. 19].

J. A. Hagan, doing business as the El Rey Cheese Company, on March 15, 1946, made a return for the calendar year 1945 and on March 15, 1947, made a return for the calendar year 1946 for federal income taxes, showing $592.04 and $3,181.95, respectively, for taxes due. Each amount was remitted with the return to the Collector of Internal Revenue at Phoenix, Arizona [R. 20, 23-24].

There existed between J. A. Hagan and his brother, Evert L. Hagan, a partnership in the El Rey Cheese Company [R. 20, 24].

On January 9, 1950, the Commissioner of Internal Revenue filed a notice of jeopardy delinquent tax assessment against Evert L. Hagan for the years 1945 and 1946 claiming deficiencies based upon the alleged net income of the El Rey Cheese Company [R. 21, 24].

A re-audit of the books of the El Rey Cheese Company for the years 1945 and 1946 showed that there was no net income on account of the operations of the company for these years [R. 21, 24-25].

Evert L. Hagan timely filed a petition in the United States Tax Court for redetermination of his tax liabilities for the years 1945 and 1946 [R. 21, 24].

By stipulation it was agreed there was no tax liability upon Evert L. Hagan for the years 1945 and 1946 on account of the net income arising out of the operation of the El Rey Cheese Company. The stipulation was adopted by the Tax Court in entering its decision on January 19, 1953, disposing of the case and determining that there was no tax liability upon Evert L. Hagan [R. 21, 25].

The stipulation and the decision of the Tax Court constituted a determination under Section 3801 of the Internal Revenue Code; the effect thereof was to allow J. A.

Hagan, partner of Evert L. Hagan, to claim a refund for an adjustment, correction and refund, notwithstanding the fact that the ordinary period limitation for claiming had run [R. 21-22, 25].

On September 6, 1952, appellant-administrator filed with the Collector of Internal Revenue at Phoenix, Arizona, a claim for refund for $592.04, plus interest, and for $3,181.95, plus interest, for the taxes paid in 1945 and 1946, respectively. [Copies of these claims are made a part of this complaint, Exs. A and D.] [R. 22, 25-26, 28-29, 44-45.]

In December of 1953, the representatives of the Government corresponded with the administrator and indicated they were going to reject the claims; thereafter on December 10, 1953, administrator called attention to the determination of the Tax Court. In the months of April and May 1954 there were conferences and correspondence following up the contention of the administrator that the determination of the Tax Court constituted a determination under Section 3801 of the Internal Revenue Code. [This correspondence is incorporated into the complaint as Ex. B.] [R. 22, 26, 30-42.]

The correspondence and conferences which were initiated in December, 1953, constituted informal claims for refund under Section 3801 of the Internal Revenue Code and the representatives of the Government accepted them as such and dealt with the claims made in this manner the same as if they had been formally presented. They purported to rule upon the merits of the claims and did not reject the claims because of the form in which they were presented [R. 22-23, 26].

The demands for refund have been refused by the Government [Ex. C; R. 43; 23, 26-27].

Exhibits A and D to the administrator's first amended complaint are claims for refund for the years 1945 and 1946, and are allegedly dated September 6, 1952. The reasons set forth in support of the claims were that an audit of the books of the El Rey Cheese Company revealed that the business sustained a net operating loss, and also that a deficiency determination and assessment had been made against Evert L. Hagan, the brother and general agent in fact of the taxpayer-decedent for the alleged earnings of the business on the grounds that the business did not belong to James A. Hagan but rather to Evert L. Hagan [R. 28-29, 44-45].

Exhibit B sets forth a letter dated December 10, 1953, in which the administrator refused to sign a claim withdrawal form, stating [R. 30-31]:

> You no doubt aware, or can become aware, that the government by stipulation agreed to a decision that has been entered by the United States Tax Court in Docket #27441 adjudged that I was not personally liable for any taxes for these years. My brother's liability as associate or partner could be no greater than mine. Therefore if I owed nothing then he overpaid. This decision was entered January 19, this year.

Additionally, Exhibit B sets forth a letter dated May 17, 1954, to the Regional Commissioner, Internal Revenue Service, in which the administrator stated in part [R. 33-34]:

> Pursuant to our conference of April 23rd, 1954, I have had my attorney look into the question of whether or not the statute of limitations acted as a bar to the above-described claim. After somewhat conclusive study it is his opinion that the bar of the

> Statute of Limitations is removed by the effect of Section 3801, Internal Revenue Code. The facts will show that though no formal partnership had been entered into between myself and J. A. Hagan in the operation of the El Rey Cheese Company that in effect it was a family partnership, and other courts have on a full review of the facts in effect so held. This being so the effect of the determination with regard to my tax liability during the years 1945 and 1946 when this relationship existed would have the effect of allowing for an adjustment in face of the regular Statute of Limitations.

Also included in Exhibit B is a letter dated May 20, 1954, from the Regional Commissioner, Internal Revenue Service, in which the administrator is informed relative to the refund claims for the years 1945 and 1946 that the "determination" of the Tax Court did not meet the requirements of Code Section 3801(b), "Circumstances of Adjustment." [R. 41-42.]

The Government moved the court to dismiss the first amended complaint on the grounds that the court lacked jurisdiction over the subject matter and that the first amended complaint failed to state a claim upon which relief could be granted [R. 16-18, 47-48].

An order granting the motion to dismiss was made on August 10, 1955 [R. 49-50], and the administrator appeals from the judgment which was entered on this order on October 12, 1955 [R. 57-58].

Summary of Argument.

1. In order for the administrator to maintain this action, it is necessary that a claim for refund have been timely filed, and that the claim set forth the grounds upon which the cause of action in this Court is based. Under Section 322(b) of the Internal Revenue Code of 1939, generally applicable to refund claims, it was necessary for the administrator to file a claim within three years from March 15, 1946, and March 15, 1947, the dates on which returns were filed and taxes paid. This was not done since the complaint alleges that the claims first filed were dated September 6, 1952.

The administrator, however, contends that Section 3801 of the Code applies in this case in mitigation of the effect of the limitations prescribed in Section 322. While it is the Government's position that Section 3801 does not apply, even assuming that it does, the administrator has failed to file a claim for refund within the time required by that section, which would be January 19, 1954. The first time that the administrator made any reference to Section 3801 (and it is not conceded that even then a valid claim for refund was made) was on May 17, 1954. This was not timely. The formal claims dated September 6, 1952, and the alleged informal claim dated December 10, 1953, all failed to set forth Section 3801 as a grounds for recovery and all failed to set forth facts under which Section 3801 would apply. Since the formal claim and the letter of December 10, 1953, were not based upon the same cause of action upon which the alleged claim of May

17, 1954, was set forth, they may not be amended by the later claim. It has been held by the Supreme Court that a claim based upon one cause of action might not be amended by a claim based upon a second and separate cause of action where the later claim is barred by the statute of limitations. Also, the contention of the administrator that the Commissioner, by purportedly ruling on the merits of the administrator's claims under Section 3801, has waived the usual requirements for refund claims is not supported by case law. While the Commissioner might waive procedural requirements of the Regulations, he does not have the authority to waive the statutory mandate that a claim setting forth the cause of action must be timely filed.

Since the administrator has failed to allege a timely filing of a claim for refund, and this requirement of Congress is jurisdictional in nature, the District Court was correct in granting the motion of the United States to dismiss the complaint.

2. In addition, the complaint clearly fails to meet the specific requirements of Section 3801 and thus that section is not applicable. In order for the administrator to avail himself of the benefits of Section 3801, it is incumbent that he fit precisely within its framework.

The decision of the Tax Court stated only that Evert L. Hagan was not liable for income taxes for the years 1945 and 1946. It did not state the grounds upon which it based this determination, and it is submitted that this is not the type of a "determination" which is required by

Section 3801(a)(1)(B). Also, it is not possible to ascertain from the so-called determination of the Tax Court whether or not the Tax Court adopted a position maintained by the Commissioner which was inconsistent with the erroneous inclusion of net income as is required by subsection (b). The decision of the Tax Court, in addition to meeting the two above discussed requirements, must also, according to subsection (b)(1) require the inclusion in gross income of an item which was erroneously included in the gross income of a related taxpayer. Obviously, there was not such a requirement in the case at bar. On the contrary, it was specifically decided that Evert L. Hagan was not deficient in his taxes for the years 1945 and 1946 and the effect of this decision was that he was not required to include any items at all within his gross income. It can therefore be seen that the situation herein does not meet the specific conditions under which Section 3801 becomes applicable. Since Section 3801 does not apply to mitigate the effect of the statute of limitations as prescribed in Section 322, the administrator's claims are barred by his failure to file claims for refund within the time allowed by Section 322 of the Code.

Therefore, it is submitted that the judgment of the District Court dismissing the administrator's first amended complaint was correct and should be affirmed.

ARGUMENT

I.

The District Court Did Not Have Jurisdiction Over This Action Since the First Amended Complaint Failed to Allege the Filing of Claims for Refund Within the Time Limitations Provided by Section 322 or Section 3801 of the Internal Revenue Code of 1939.

In order for the administrator to maintain this action, it is necessary that a claim for refund have been timely filed (*Noland v. Westover,* 172 F. 2d 614 (C. A. 9th), certiorari denied, 337 U. S. 938), and that the claim set forth the grounds upon which the cause of action in this Court is based (*Vica Co. v. Commissioner,* 159 F. 2d 148 (C. A. 9th), certiorari denied, 331 U. S. 833).

Section 7422(a) of the Internal Revenue Code of 1954 (Appendix, *infra*) provides that no suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, until a claim for refund or credit has been duly filed. The allegations of the first amended complaint, hereafter referred to as "complaint", show that there was not in this instance a timely filing of a valid claim for refund.

Section 322(b) of the Internal Revenue Code of 1939[1] (Appendix, *infra*), which is applicable to the question of filing of claims for refund (other than claims arising under Section 3801 of the Code), provides that a claim must be filed within three years from the time the return was filed by the taxpayer or within two years from the time the

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[1]References to "Code" or "Internal Revenue Code" refer to the Internal Revenue Code of 1939 unless otherwise noted.

tax was paid, whichever period expires the later. The complaint (paragraph IV of the first cause of action and paragraph II of the second cause of action) alleges that returns were filed and payments made on March 15, 1946, and on March 15, 1947 [R. 20, 23-24]. Thus, under Section 322, to be eligible for a refund, claims must have been filed within three years or no later than March 15, 1949, and March 15, 1950. Yet the complaint (paragraphs V and III) alleges that the claims were first filed on September 6, 1952 [R. 22, 25]. Patently, the requirements of Section 322(b) have not been met and the administrator did not timely file his claims for refund under that section.

The administrator contends, however, that Section 3801 of the Code (Appendix, *infra*) applies in this case to mitigate the effect of the limitations prescribed in Section 322. While the second point of argument of the United States will show that the complaint does not state a situation which falls under Section 3801 for several reasons, for the purposes of argument only it will be assumed that Section 3801 is applicable. Even then, it is submitted, a claim for refund was not timely filed. Section 3801(c) provides that an adjustment for overpayment may be made as if on the date of the determination one year remained before the expiration of the periods of limitation upon filing claims for refund. Since the administrator has alleged that a determination within the meaning of Section 3801 took place on January 19, 1953 [R. 21, 25], it then follows that a claim for refund, to be timely filed, must have been made on or prior to January 19, 1954. It is clear from the complaint that the claim for refund under Section 3801, if one was made at all, was not made until the administrator's letter, dated

May 17, 1954, and thus was without the time prescribed by the statute.[2]

The first mention by the administrator of a cause of action based on Section 3801 took place on May 17, 1954, in his letter to the Regional Commissioner [R. 33-40]. The more or less formal claims[3] filed on September 6, 1952 [R. 22, 25-26], prior to the alleged determination under Section 3801, can not serve as claims for refund under that section as they in no manner set forth Section 3801 or facts based on that section as grounds for recovery. Besides the formal requisites of the claim, it is necessary for the administrator to set forth the specific facts upon which he bases his contention that Section 3801 is applicable. Thus, in the instant case the administrator would first have to claim that Section 3801 applies; then that there had been a determination within the meaning of the section; that the Commissioner had taken an inconsistent position; that the inconsistency of the Commissioner has resulted in one of the "Circumstances of Adjustment" set forth by the section; and that the taxpayer-decedent and Evert L. Hagan were "related taxpayers" within the meaning of the section. It is clear that this could not have been done, and was not done in fact, in the claims of September 6, 1952, which was prior to the Tax Court

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[2]It is doubtful that any valid claim at all for refund under Section 3801 was made. The purported claims which the taxpayer sets forth in Exhibits A, B, and D to his complaint [R. 28-42, 44-45] fail to meet the requirements of Regulations 111, Section 29.322-3 (Appendix, *infra*), in many respects. The statements of grounds and facts were not verified by the requisite written declaration that they were made under the penalties of perjury. There were not annexed to the claims the required certified copies of letters of administration. And the letters of December 10, 1953, and May 17, 1954, were not in the form specified by the Regulations.

[3]See footnote 2, *supra*.

determination of January 19, 1953. This Court has held that a claim for refund must contain an adequate statement of the taxpayer's contentions (*Vica Co. v. Commissioner, supra*) and in this case there has been no such statement. In addition, a reading of the letter dated December 10, 1953, from the administrator to the Audit Division of the Internal Revenue Service [R. 30-31] shows that it can not serve as a valid claim for refund since it, as all the other previous correspondence in this matter, failed completely to set forth the grounds upon which a recovery under Section 3801 might be based. The letter of December 10 did nothing to apprise the Internal Revenue Service that the administrator was claiming that Section 3801 of the Code applied. Indeed, there was no hint that the administrator was claiming that he fell within the mitigating provisions of Section 3801 until his letter of May 17, 1954 [R. 33-40], in which he quite clearly set forth his position in this respect. However, if a recovery was to be made under Section 3801, it was incumbent upon the administrator to file his claim for refund by January 19, 1954. It thus follows that the letter of May 17th of that year could not in any event serve as a timely claim for refund.

That the letter of May 17th, which was not a timely claim, could not serve as an amendment of the letter of December 10, 1953, is clear from the many decisions in this respect. The first formal claims [R. 28-29, 44-45] and the letter of December 10, 1953 [R. 30-31], were not based upon a cause of action arising out of Section 3801 of the Code. The letter of May 17, 1954, which the administrator contends to be a valid informal claim, was based upon a cause of action arising under Section 3801. It has been held that a claim based upon one cause of ac-

tion might not be amended by a claim based upon a second and separate cause of action where the later claim is barred by the statute of limitations. *United States v. Andrews,* 302 U. S. 517; *United States v. Garbutt Oil Co.,* 302 U. S. 528. The administrator's attempt to alter by amendment the cause of action out of which he claimed to be entitled to a refund is clearly proscribed by the holdings of the Supreme Court in the *Andrews* and *Garbutt Oil* cases, *supra,* and it is therefore submitted that since the letter of May 17, 1954, may not serve to amend the informal letter dated December 10, 1953, which the administrator contends to be a claim, the complaint on its face shows that if any claim for refund under Section 3801 was made at all it was not timely filed by January 19, 1954.

It is contended by the administrator that the Commissioner, by letter of May 20, 1954 [R. 41, 42], has purportedly ruled on the merits of the administrator's claims under Section 3801 and has therefore waived the usual requirements for refund claims. While there is some case authority for the proposition that the Commissioner might, by a consideration of the merits, waive any *procedural* requirements of his Regulations, there is likewise ample authority for the point that the Commissioner can not waive the statutory mandate that a claim setting forth the cause of action must be timely filed. In the *Garbutt Oil Co.* case, *supra,* the Supreme Court held that the Commissioner was without power to waive the bar of the statute of limitations against a claim for a tax refund. In that case the Supreme Court considered the same argument advanced by the administrator in the case at bar, namely, that although an attempted amendment of a claim was not timely, the Commissioner waived the time

requirement by considering the case on its merits. The Court clearly rejected this contention and stated (p. 533):

> The argument confuses the power of the Commissioner to disregard a statutory mandate with his undoubted power to waive the requirements of the Treasury regulations. The distinction was pointed out in *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62, 71, wherein it was said: "The line of division must be kept a sharp one between the function of a statute requiring the presentation of a claim within a given period of time, and the function of a regulation making provision as to form. The function of the statute, like that of limitations generally, is to give protection against stale demands. The function of the regulation is to facilitate research."

Thus, it can be seen that in the instant case, while the Commissioner might have waived the formal requisites of the Treasury Regulations for refund claims (although it is not conceded that he did so in this case), he did not have the power to waive the necessity of making a claim for refund on the cause of action in question within the time period required by statute.[4] Since no claim for refund based on Section 3801 of the Code was filed within the one year period required by that statute, the claim is barred.

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[4]*Keneipp v. United States,* 184 F. 2d 263 (C. A. D. C.), upon which the administrator places great reliance, presented a situation totally different from that at bar. In the *Keneipp* case, two claims for refund were filed, the first within the statutory period and the second subsequent to the time allowed. The court found that the first claim was sufficiently broad and definite to raise the cause of action upon which the complaint was based, and that the Commissioner had so considered the first claim. The second claim, untimely filed, was held to be merely a specification of the first claim, and thus was simply amendatory of the previous claim.

The requirements which Congress has set up by statute as the conditions under which the United States consents to be sued for the recovery of tax are jurisdictional in nature, and must be established by the person invoking the jurisdiction of the court. *United States v. Chicago Golf Club,* 84 F. 2d 914 (C. A. 7th). The administrator, in the complaint presently before this Court, has failed to establish that he has fulfilled the jurisdictional requirements of Section 7422 of the Internal Revenue Code of 1954, and hence the District Court correctly granted the motion of the United States to dismiss the complaint.

II.

Section 3801 of the Code Does Not Apply to Mitigate the Effect of the Statute of Limitations.

As shown in Part I of the Government's argument, the administrator, by his failure to file a claim for refund within the time prescribed in Section 322(b) of the Code is barred by Section 7422 of the Internal Revenue Code of 1954 from maintaining an action for the recovery of such taxes. The administrator contends, however, that the effect of Section 322 is mitigated by Section 3801 of the Code which he claims to be applicable. It is the position of the Government, as pointed out *supra* that, even assuming Section 3801 applies, the administrator failed to file a claim for refund within the time set forth by that statute. In addition, the complaint clearly fails to meet the specific requirements of Section 3801 and thus that section is not applicable. The effect of the statute of limitations is mitigated by Section 3801 under a certain set group of circumstances, and in order for the administrator to avail himself of the benefits of the section it is incumbent upon him to show that he fits precisely within

its framework.[5] Under subsection (c) the bar of the statute of limitations is removed only if there is adopted in a determination within the meaning of the section one of the enumerated circumstances of adjustment described in subsection (b). Under subsection (b), so far as is pertinent to the case at hand, an adjustment is authorized only for a situation where (1) there has been a final decision of the Tax Court (2) which required inclusion in the gross income of Evert L. Hagan the net income of the El Rey Cheese Company, (3) this net income was erroneously included in the gross income of the taxpayer-decedent, (4) the decision of the Tax Court adopted a position maintained by the Commissioner which was inconsistent with the erroneous inclusion of this net income, (5) the taxpayer-decedent was a "related taxpayer" to Evert L. Hagan, and lastly, (6) on the date of the Tax Court decision the claim was barred by the statute of limitations.

The allegations of the first amended complaint fail to meet many of the precise requirements of Section 3801 set forth above. Paragraph IV of the first cause of action [R. 21] and paragraph II of the second cause of action [R. 25] state in part that by stipulation in Docket No. 27441 United States Tax Court entitled "Evert L. Hagan,

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[5]Section 3801 is thoroughly discussed in 2 Mertens, Law of Federal Income Taxation, Sec. 1401. It is there stated (p. 397):

> The principal purpose of this provision was to avoid the confusion inherent in the application of the principles of estoppel, recoupment, and the statute of limitations, both by and against the government, in situations in which *an inconsistent position* had been taken either by the taxpayer or the taxing authority. Corrections are authorized only when the Commissioner, if the correction would result in an allowance of a refund or credit for the year with respect to which the error was made, or the taxpayer, if the correction would result in an additional assessment for such year, has maintained a position inconsistent with the error.

Petitioner, vs. Commissioner of Internal Revenue, Respondent" it was agreed there was no tax liability upon Evert L. Hagan for the years 1945 and 1946 on account of the net income arising out of the operation of the El Rey Cheese Company; that the stipulation was adopted by the Tax Court in entering its decision disposing of the case and determining that there was no tax liability upon Evert L. Hagan upon January 19, 1953. The administrator has nowhere stated that the Tax Court's decision which adopted the above-mentioned stipulation did any more than state that there were no deficiencies in the income taxes of Evert L. Hagan for the years in question. A decision of the Tax Court, based on a stipulation between the parties, such as the one at bar, in which no reasons at all are given for the decision, is not the type of decision which the section requires. In view of the necessity of ascertaining the basis of the Tax Court's decision, a determination solely that no taxes were due, with nothing more, would not appear to be a "determination" within the meaning of Section 3801(A)(1)(B).[6]

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[6]See, *e.g.,* 2 Mertens, Law of Federal Taxation, pp. 425-426 where, in discussing a suggestion of Kent, Mitigation of the Statute of Limitations in Federal Income Tax Cases, 27 Cal. L. Rev. 109 (1939), that cases which are closed on the basis of a stipulation giving effect to settlement agreements while pending before the court should be included among the judgments considered to be a determination for purposes of the statute, it is stated:

> The author considers that since it is the order of the Board entered pursuant to the stipulation which gives the latter its legal efficacy, these provisions must be broadly interpreted to include such settlements. In view, however, of the many variables entering into the usual settlement agreement and the frequent difficulty of determining what the Board has "determined," it would seem to be extremely doubtful whether anything less than a decision on the merits could be considered a determination in which an inconsistent position is adopted, unless the stipulation states in detail the items agreed to which enter into the agreed upon deficiency or refund.

The requirements of subsection (b) that the decision of the Tax Court adopt a position maintained by the Commissioner which was inconsistent with the erroneous inclusion of the net income is likewise not met. From the complaint it can be seen that it is impossible to discover whether or not the Tax Court's decision adopted an inconsistent position of the Commissioner, or indeed, that the Commissioner ever maintained an inconsistent position. From what can be discovered from the complaint, it is possible that the Tax Court and the Commissioner could have decided that the El Rey Cheese Company did not belong to Evert L. Hagan. In any event, there is nowhere shown an adoption of an inconsistent position maintained by the Commissioner.

The decision of the Tax Court, in addition to meeting the requirements that it be a determination within the meaning of the section and that it adopt an inconsistent position maintained by the Commissioner, must also, according to subsection (b)(1) require the inclusion in gross income of an item which was erroneously included in the gross income of a related taxpayer. Obviously, there never was any such requirement in the case at bar. The complaint does not allege that Evert L. Hagan was required to include within his gross income the net income of the El Rey Cheese Company. On the contrary, it was specifically decided that Evert L. Hagan was not deficient in his taxes for the years 1945 and 1946 and the effect of this decision was that *he was not required to include any items at all within his gross income.* Thus, it can be seen that the situation herein does not fall within any of the "Circumstances of Adjustment" of subsection (b) and that the administrator has failed completely to allege facts which would make Section 3801 applicable in his case.

Since Section 3801 does not apply to mitigate the effect of the statute of limitations as prescribed in Section 322, the administrator's claims are barred by his failure to file claims for refund within the time allowed by Section 322 of the Code.

Conclusion.

For the foregoing reasons, the judgment of the District Court dismissing the administrator's first amended complaint was correct and should be affirmed.

Respectfully submitted,

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July, 1956.

APPENDIX.

Internal Revenue Code of 1939:

SEC. 322. REFUNDS AND CREDITS.

* * * * * * * * *

(b) *Limitation on Allowance.*—

(1) *Period of limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. * * *

* * * * * * * * *

(26 U. S. C. 1952 ed., Sec. 322.)

SEC. 3801. MITIGATION OF EFFECT OF LIMITATION AND OTHER PROVISIONS IN INCOME TAX CASES.

(a) *Definitions.*—For the purpose of this section—

(1) *Determination.*—The term "determination under the income tax laws" means—

(A) A closing agreement made under section 3760;

(B) A decision by the Tax Court or a judgment, decree, or other order by any court of competent jurisdiction, which has become final; or

(C) A final disposition by the Commissioner of a claim for refund. For the purposes of this section a claim for refund shall be deemed finally disposed of by the Commissioner—

(i) as to items with respect to which the claim was allowed, upon the date of allowance of refund or credit or upon the date of mailing

notice of disallowance (by reason of offsetting items) of the claim for refund, and

(ii) as to items with respect to which the claim was disallowed, in whole or in part, or as to items applied by the Commissioner in reduction of the refund or credit, upon expiration of the time for instituting suit with respect thereto (unless suit is instituted prior to the expiration of such time).

Such term shall not include any such agreement made, or decision, judgment, decree, or order which became final, or claim for refund finally disposed of prior to August 27, 1938.

(2) *Taxpayer.*—Notwithstanding the provisions of section 3797 the term "taxpayer" means any person subject to a tax under the applicable Revenue Act.

(3) *Related taxpayer.*—The term "related taxpayer" means a taxpayer who, with the taxpayer with respect to whom a determination specified in subsection (b) (1), (2), (3), or (4) is made, stood, in the taxable year with respect to which the erroneous inclusion, exclusion, omission, allowance, or disallowance therein referred to was made, in one of the following relationships: (A) husband and wife; (B) grantor and fiduciary; (C) grantor and beneficiary; (D) fiduciary and beneficiary, legatee, or heir; (E) decedent and decedent's estate; or (F) partner.

(b) [as amended by Sec. 211 (a) and (b), Technical Changes Act of 1953, c. 512, 67 Stat. 615] *Circumstances of Adjustment.*—When a determination under the income tax laws—

(1) Requires the inclusion in gross income of an item which was erroneously included in the gross income of

the taxpayer for another taxable year or in the gross income of a related taxpayer; or

(2) Allows a deduction or credit which was erroneously allowed for the taxpayer for another taxable year or to a related taxpayer; or

(3) Requires the exclusion from gross income of an item with respect to which tax was paid and which was erroneously excluded or omitted from the gross income of the taxpayer for another taxable year or from the gross income of a related taxpayer; or

(4) Allows or disallows any of the additional deductions allowable in computing the net income of estates or trusts or requires or denies any of the inclusions in the computation of net income of beneficiaries, heirs, or legatees, specified in section 162 (b) and (c) of chapter 1, and corresponding sections of prior revenue Acts, and the correlative inclusion or deduction, as the case may be, has been erroneously excluded, omitted, or included, or disallowed, omitted, or allowed, as the case may be, in respect of the related taxpayer; or

(5) Determines the basis of property for depletion, exhaustion, wear and tear, or obsolescence, or for gain or loss on a sale or exchange, and in respect of any transaction upon which such basis depends there was an erroneous inclusion in or omission from the gross income of, or an erroneous recognition or nonrecognition of gain or loss to, the taxpayer or any person who acquired title to such property in such transaction and from whom mediately or immediately the taxpayer derived title subsequent to such transaction; or

(6) Disallows a deduction or credit which should have been allowed to, but was not allowed to, the taxpayer for another taxable year, or to a related taxpayer; but

this paragraph shall apply only if (A) the determination became final on or after June 1, 1952, and (B) credit or refund of the overpayment attributable to the deduction or credit which should have been allowed to the taxpayer or related taxpayer was not barred, by any law or rule of law, at the time the taxpayer first maintained before the Secretary or the Tax Court of the United States, in writing, that he was entitled to such deduction or credit in the taxable year for which it is so disallowed; or

(7) Requires the exclusion from gross income of an item which is includible in the gross income of the taxpayer for another taxable year or in the gross income of a related taxpayer; but this paragraph shall apply only if (A) the determination became final on or after June 1, 1952, and (B) assessment of deficiency under section 272(a) by the Secretary for such other taxable year or against such related taxpayer was not barred, by any law or rule of law, at the time the Secretary first maintained in a notice of deficiency sent pursuant to section 272(a) or before the Tax Court of the United States, that such item should be included in the gross income of the taxpayer for the taxable year to which the determination relates—and on the date the determination becomes final, correction of the effect of the error is prevented by the operation (whether before, on, or after May 28, 1938) of any provision of the internal-revenue laws other than this section and other than section 3761 (relating to compromises), then the effect of the error shall be corrected by an adjustment made under this section. Except in cases described in paragraphs (6) and (7) such adjustment shall be made only if there is adopted in the determination a position maintained by the Commissioner (in case the amount of the adjustment

would be refunded or credited in the same manner as an overpayment under subsection (c)) or by the taxpayer with respect to whom the determination is made (in case the amount of the adjustment would be assessed and collected in the same manner as a deficiency under subsection (c)), which position is inconsistent with the erroneous inclusion, exclusion, omission, allowance, disallowance, recognition, or nonrecognition, as the case may be. In case the amount of the adjustment would be assessed and collected in the same manner as a deficiency, the adjustment shall not be made with respect to a related taxpayer unless he stands in such relationship to the taxpayer at the time the latter first maintains the inconsistent position in a return, claim for refund, or petition (or amended petition) to the Tax Court for the taxable year with respect to which the determination is made, or if such position is not so maintained, then at the time of the determination.

(c) *Method of Adjustment.*—The adjustment authorized in subsection (b) shall be made by assessing and collecting, or refunding or crediting, the amount thereof, to be ascertained as provided in subsection (d), in the same manner as if it were a deficiency determined by the Commissioner with respect to the taxpayer as to whom the error was made or an overpayment claimed by such taxpayer, as the case may be, for the taxable year with respect to which the error was made, and as if on the date of the determination specified in subsection (b) one year remained before the expiration of the periods of limitation upon assessment or filing claim for refund for such taxable year.

* * * * * * * * *

(26 U. S. C. 1952 ed., Sec. 3801.)

Internal Revenue Code of 1954:

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) *No Suit Prior to Filing Claim for Refund.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

* * * * * * * * *

(26 U. S. C. 1952 ed., Supp. II, Sec. 7422.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.322-3. *Claims for Refund by Taxpayers.*—Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843, and should be filed with the collector of internal revenue. A separate claim on such form shall be made for each taxable year or period.

The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. No refund or credit will be allowed after the expiration of the statutory period of limitation applicable

to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund. With respect to limitations upon the refunding or crediting of taxes, see section 29.322-7.

If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter a refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made in the claim showing that the return was filed by the fiduciary and that the latter is still acting. In such cases, if a refund or interest is to be paid, letters testamentary, letters of administration, or other evidence may be required, but should be submitted only upon the receipt of a specific request therefor. If a claim is filed by a fiduciary other than the one by whom the return was filed, the necessary documentary evidence should accompany the claim. The affidavit may be made by the agent of the person assessed, but in such case a power of attorney must accompany the claim.

Checks in payment of claims allowed will be drawn in the names of the persons entitled to the money and may be sent to such persons in care of an attorney or agent who has filed a power of attorney specifically authorizing him to receive such checks. The Commissioner may, however, send any such check direct to the claimant. In this connection, see section 3477 of the Revised Statutes (paragraph 93 of the Appendix to these regulations).

The Commissioner has no authority to refund on equitable grounds penalties or other amounts legally collected. As to claims for refund of sums recovered by suit, see sections 29.322-4 to 29.322-6, inclusive.

No. 21957

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EVERT L. KAGAN,
Administrator of the Estate of
J. A. Kagan, Deceased,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee

APPEAL FROM THE JUDGMENT OF THE UNITED
STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF CALIFORNIA

APPELLANT'S REPLY BRIEF

James A. Charlton
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Los Angeles, Calif.
Tel: [illegible]
Attorney for Appellant

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NO. 14957

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EVERT L. HAGAN, Administrator of the Estate of J. A. HAGAN, Deceased,

Appellant

VS

UNITED STATES OF AMERICA,

Appellee

An Appeal From The Judgment of The United States District Court For The Southern District of California.

APPELLANTS' REPLY STATEMENT

Appellant in this reply brief will answer the contentions made by Appellee in its brief. As near as the Appellant can ascertain the Appellee contends: Firstly, that no "determination" was alleged in the claim for relief which would invoke the provisions of Section 3801 of the Internal Revenue Code. And secondly, that even though there was such a "determination" that there was no timely claim for a refund made within the one year statutory limit under Section 3801.

Appellant wishes to set for the full text of the letter

of December 10, 1953, Exhibit "B" to the claim for relief, a thing which the Appellee apparently chose not to do. (Transcript of Record, page 30.) It is as follows:

Dec. 10, 1953

Mr. A. S. Allen
Audit Division
1031 S. Broadway
Los Angeles, Calif.

Re: Claim for Refund, Estate of J.A. Hagan 1945 & 1946

Dear Sir:

Answering yours of 12-1-53 requesting that I sign a claim withdrawal form in the above referred claims, I must refuse to do so.

You no doubt are aware, or can become aware, that the government by stimulation agreed to a decision that has been entered by the United States Tax Court in Docket [illegible] judged that I was not personally liable for any taxes for those years. My brother's liability as associate or partner could be no greater than mine. Therefore I [illegible] nothing, then be overpaid. This decision was entered Jan 19th this year.

Please reconsider the claim in the light of this additional fact.

Yours truly,

(s) Evert L. Hagan

The inclusion of the final paragraph of this letter clearly demonstrates that the Appellant was requesting the Internal Revenue Bureau to reconsider the claims in the light of the facts therein contained. And Appellant earnestly urges that these facts were such as would invoke the provisions of Section 3801. And the fact that the section

was not mentioned by name certainly could not alter the situation in view of the authorities Appellant will point out later in this reply brief. For the claim for relief alleges that from that point hence the Appellant and the Commissioners representatives treated the claim as an informal claim under Section 3801, and the Commissioner determined the claim upon the merits with a full understanding of Appellants position that the limitations of Section 3801 was applicable.

Exhibit "B" further contained a letter from Joseph T. Harlacher, Assistant Regional Commissioner, Appellate, dated May 20, 1954. In this letter the exact wording of the decision of the Tax Court of January 19, 1953 was set forth fully in the third paragraph (page 42 Transcript of Record). It is as follows:

> "The Tax Court, in its decision in the case of Evert Leo Hagan, Docket No. 27441, ordered and decided 'That there are no deficiencies in income taxes or penalties due from, or overpayment due to, petitioner for the taxable years 1945 and 1946.'"

This Honorable Court should further consider that the claim for relief alleged that the books and records of the El Rey Cheese Company were subsequently to the Commissioners Deficiency assessment reaudited, and that the re-audit upon which the stipulation and subsequent decision were based showed the company had not during the years 1945 and

1946 made any net taxable income.

APPELLANTS CONTENTIONS

I

The claim for relief alleged a "determination" within the meaning of Section 3801 I.R.C.

II

A timely and valid claim for refund under Section 3801 I.R.C. was alleged in the claim for relief.

POINTS AND AUTHORITIES

I

IN SUPPORT OF CONTENTION 1

In Mertens "Law of Federal Income Taxation", Vol. 2, Chapter 14, page 46, it is said:

> "It has been suggested that cases which are closed on the basis of a stipulation giving rise to settlement will be included among the judgments considered to be a determination for this purpose." The author was referring to I.R.C. Section 3801.

In a comment in a note to the text Mertens said that where it is difficult to determine what was "determined" that the quoted text might not apply. In the instant case it is easily apparent that the decision which was based actually upon the Commissioners acceptance of a no-audit showing no tax liability was a "determination" that petitioner Evert Hagan, who had filed no return had no tax liability for 1945 and 1946.

S See also Kent "Mitigation of the Statute of Limitations in Federal Tax Cases", 27 California Law Rev. 109, l.c. 133 wherein it is said:

> "Of much greater practical moment is the question which has been raised whether a determination under Section 820 (a)(2) (now Section 3801 I.R.C.) includes the closing of cases pending before the Board of Tax Appeals on the basis of stipulations giving effect to settlement agreements negotiated between the taxpayer and the Technical Staff of the Bureau of Internal Revenue. Leaving out of account for the present the so-called lump sum settlements which involve a special problem, it is believed that a reasonable interpretation of the section should lead to an affirmative answer to this question. There is essentially the same reason of policy for including such cases as cases of closing agreements. Moreover, it is the order of the Board entered pursuant to the stipulation which technically gives the latter its legal efficacy. A contrary interpretation would make the section a serious obstacle to the expeditious settlement [illegible] litigation.

II

IN SUPPORT OF CONTENTION NO. II

In Keneipp v U.S. 184 F(2) 263, 267, it is said:

> "The principles which determine the sufficiency of claims for refund have been stated and restated. The rule is that the claim must be sufficient to advise the Commissioner of Internal Revenue as to the items as to which the taxpayer claims error and the grounds upon which the taxpayer makes his claim. If the Commissioner understands the grounds and deals with the claim on the basis of his understanding, the claim is sufficient. A basic public policy is involved in this broad doctrine. Insistence upon nice technicalities of expression on the part of taxpayers in dealings with the Government concerning taxes must certainly compel taxpayers to deal with the Government through

technicians. The Bureau of Internal Revenue has long sought to encourage a direct, informal non-technical presentation."

See Also:

Bemis Bros. Bag Co v U.S.
77 Law Ed. 1011
U.S. vs Memphis Cotton Oil Co.,
77 Law Ed. 619
U.S. vs Factors & Fin. Co.
77 Law Ed. 633

In Mertens, Vol. 10, Section 58.24, it is said:

"There is no limit upon the number of refund claims that may be filed within the statutory period applicable to the filing of claims. Thus a defective claim may be easily corrected by the filing of a new claim which complies with the requirements. Frequently new grounds or facts are discovered, which either entitles the taxpayer to amounts of refund in addition to those already demanded, or which further sustain the claim already filed."

See:

[illegible] v U.S., 16 F(2) 377
[illegible] Oil Pictures, Inc v U.S.,
1940 P-H Par. 0[illegible], 541

ARGUMENT AND CONCLUSION

The allegation of the claim for relief clearly demonstrates these facts: (a) J. A. Hagan and Evert L. Hagan were brother partners in the El Rey Cheese Co. during the years 1945 & 1946; (b) That in January 1950 the Commissioner made a deficiency assessment against Evert L. Hagan for these years for the alleged profits Evert L. Hagan had received; (c) That for these years J. A. Hagan had paid the income taxes now the subject of this suit; (d) That a re-

audit of the company books showed there actually was no profit, and that the government accepted this re-audit and agreed to stipulate that Evert L. Hagan owed no taxes for these years in the petition for redetermination matter that was pending before the Tax Court; (e) That thereafter upon January 19, 1953 the Tax Court entered a decision stating that there were no deficiencies against Evert L. Hagan for 1945 and 1946; (f) That the estate of J. A. Hagan in Sept. of 1952 filed a claim for refund setting up the facts of the re-audit, and in December 1953 (within 1 year of the Tax Court determination) the Administrator of J. A. Hagan's estate requested reconsideration of the claims upon the basis of the Tax Court determination.

From that point hence, it is alleged, that the Commissioner treated the claim as an informal one under Section 3801 and finally rendered a decision on the merits as to whether or not Section 3801 relieved the ordinary statute of limitation. Appellant earnestly contends that if the spirit of the section, in the light of the existing case law, is to be followed, this court will hold first that there was a "determination" within the provisions of Section 3801, and that the letter of December 10, 1953 constituted an informal claim under Section 3801, and will therefore hold that the claim for relief is a legal and valid one

requiring an answer from the Appellee.

Jesse A. Hamilton
Attorney for Appellant

No. 14957

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

EVERT L. HAGAN, ADMINISTRATOR)
OF THE ESTATE OF J. A. HAGAN,)
Appellant,)
)
vs.)
)
UNITED STATES OF AMERICA,)
Respondent,)
)

FILED

MAY 23 1956

PAUL P. O'BRIEN, CLERK

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court for the Southern District of California, Central Division.

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IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

EVERT L. HAGAN, ADMINISTRATOR OF THE ESTATE OF J. A. HAGAN, Appellant, vs. UNITED STATES OF AMERICA, Respondent,	No. 14957

STATEMENT

The [illegible] question to be determined upon this Appeal is whether or not the First Amended Complaint states a good Claim for Relief or Cause of Action. The District Court granted a Motion to Dismiss the action filed by the Defendant. From this ruling this appeal was taken.

The First Amended Complaint alleges:

(1) That Plaintiff was Administrator of the Estate of J. A. Hagan.

(2) That the action was brought under Section 1346 (a)(1) of Title 28 U.S. Code.

(3) That J. A. Hagan and Evert L. Hagan were in fact partners during the years 1945 and 1946, operating the El Rey Cheese Co.

(4) That J. A. Hagan made a return in the amount of, and paid taxes in the sum of $592.04 for 1945 and $3181.95 for 1946, on supposed profits of the El Ray Cheese Co.

(5) That upon January 9, 1950 the Commissioner of Internal Revenue made a deficiency assessment against Evert L. Hagan for alleged profits made by Evert L. Hagan from the operation of the El Rey Cheese Company.

(6) That within the required time Evert L. Hagan petitioned the Tax Court of the U.S. for a redetermination of his tax liability for the years 1945 and 1946.

(7) That a re-audit of the books and records of the El Rey Cheese Company for the years 1945 and 1946 disclosed there were no net profits but rather a loss for [illegible] years.

(8) That upon January 19, 1953 the tax court of the United States rendered a decision and determination based upon written stipulation of counsel for both parties which ordered and decided that there were no deficiencies in income taxes or penalties due from Evert L. Hagan for the years 1945 and 1946.

(9) That upon September 6, 1952 plaintiff in this action filed form #843 claiming a right to refund of taxes paid by J. A. Hagan for the years 1945 and 1946, and based the claim upon the re-audit which disclosed there was no taxable income due from J. A. Hagan on account of operation of the El Rey Cheese Co. for these years.

(10) That within one year after the determination of the Tax Court in December 1953, the representative of the U.S. indicated they were going to recommend denial of the claims for refund and that Plaintiff called their attention to the "determination" of the Tax Court and asked that the claims be reconsidered in view of the Tax Court's decision; that thereafter the parties conferred and corresponded relative to the applicability of Section 3801 I.R.C.; and that the representatives of the Commissioner of Internal Revenue accepted the informal presentation of the claim under Section 3801 and ruled upon the merits of the claim but determined that J. A. Hagan and Ivert L. Hagan were not "related Taxpayers" so that Section 3801 I.R.C. would not apply and recommended the denial of the claims.

(11) That upon January 27, 1955, the Commissioner of Internal Revenue formally by registered mail refused the demand for refund.

(12) That the claims do not exceed the statutory limit of $10,000.

APPELLANT'S CONTENTIONS AND STATEMENT OF POINTS ON APPEAL

(1) The First Amended Complaint stated a good claim for relief under Section 3801 Internal Revenue Code.

(2) The correspondence, conferences and conduct of Plaintiff and Representatives of the United States caused the original claim to be converted into an informal claim for refund under Section 3801 I.R.C. presented within one year of the determination of the Tax Courts of the United States, and since the representatives of the Commissioner accepted it as such, understood it as such, and ruled upon it as such, then it is as valid as a formal claim.

(3) The Motion to Dismiss the First Amended Complaint should not have been granted.

POINTS AND AUTHORITIES

I

The First Amended Complaint stated a good cause for Action for a Claim for Refund under Section 3801 Internal Revenue Code.

Plaintiff submits that the above allegations state a valid claim for relief and that the Complaint should not have been dismissed.

The statute (Section 3801) allows adjustment under subsection 4 where there has been an inconsistent determination in the case of a "related taxpayer".

Mertens, "Law of Federal Taxation"

Vol 2, page 410, et. seq.

And a decision of the Tax Court is a "determination" as contemplated by Section 3801.

Mertens, "Law of Federal Taxation"

Volume 2, page 422

The Statute itself provides:

"The term related taxpayer means a taxpayer who, with the taxpayor with respect to whom a determination specified in subsection (b) (1), (2), (3), and (4) is made, stood, in the taxable year with respect to the erroneous inclusion, exclusion, ommission, allowance, or disallowance therein referred to was made, in one of the following relationships:

(A) Brother."

See: "The Problems of Related Taxpayers: A Prosedural Study"

66 Harv. L. Rev. 225

II

The claim having been made, even though informally within one year of the determination gave the Plaintiff a right to relief under Section 3801.

For a recent decision discussing the requirements of claims for refund see Kencipp vs U.S. 85 Fed (2) 902, 104 F(2) 263, 203 F(2) 397 where it was said:

"The rule is that the claim must be sufficient to advise the Commissioner of Internal Revenue as to the items as to which the taxpayer claims error and the grounds which the taxpayer makes his claim. If the Commissioner understands the grounds upon which the taxpayer makes his claim and deals with the claim on the basis of his understanding, this claim is sufficient". (Emphasis Appellant's)

For an expression of the United States Supreme Court to the same effect see the case of Bonwit Teller and Co v U.S. 75 Law Ed. 1018.

Mortens, vol. 10 at page 341 says:

"There is no limit upon the number of refund claims which may be filed within the statutory period applicable to the filing of claims. [illegible] corrected by filing a new claim which complies with the requirements. Frequently new grounds or facts are discovered, which either entitles the taxpayer to amounts of refund in addition to those already demanded or which further sustain the claim already filed."

In the case of Davis v U.S. 46 F (2) 37? it was held that the protest of a taxpayer setting forth facts in more detail was regarded as an amendment to the claim.

CONCLUSION

The Complaint surely shows facts which if proved would make a case under Section 3801. And the Exhibits to the Complaint show that the claim though originally filed prior to

the determination of the U.S. Tax Court, that both Plaintiff and Representatives of the Defendant treated it as if it were a claim under Section 3801. Plaintiff particularly calls attention to the two letters from representatives of the defendant dated April 19 and 20, 1954. They show that the reason the claim was rejected was because J. A. Hagan in their opinion was not a "related taxpayer" or Partner. And there is no intimation that they were rejecting the claim because of the manner or form in which it had been presented. In other words, the complaint sets out facts which show that within one year of the determination of the Tax Court the representatives of the Commissioner of Internal Revenue had been informed of the determination and that the Plaintiff was claiming rights under Section 3801. And they considered and decided [illegible] with that understanding. The rule in the Keneipp Case should therefore be applicable, and Plaintiff urges that it then follows that the Motion to Dismiss should not have been granted; that the judgment herein entered should be reversed and the case remanded with directions to the District Court to require the Defendant to answer.

Respectfully Submitted,

Jesse A. Hamilton
Attorney for Plaintiff.